

## **COMMUNICATING THE DISCHARGE DECISION**

1. Use the truth and understand that the only unlawful reasons are those which are discriminatory based upon a prohibited factor, such as age, race or retaliation.
2. Never fail to give the truthful reason even when other secondary reasons provide the easy way out. Employers who make the truthful yet difficult disclosure to the employee do better at trial.
  - a. They avoid articulating a rationale during the course of litigation which was not mentioned at the conference with the employee. Jurors tend to look at such explanations, even if truthful, as nothing more than “lawyer spin”.
  - b. The credibility of the witnesses is preserved as the position of the employer at trial does not contradict what the supervisor said in the conference.
  - c. Let the employee tell his or her story. If an employee wants to “vent” during a disciplinary conference—let it happen. A small percentage of cases are filed by plaintiffs because they want to tell their side of the story and believe they were never given the chance. Letting employees vent during conferences may allow you to avoid that small percentage of claims which are filed for this reason. Nevertheless, it is wise not to debate with the employees. This only opens the door to statements or evidence which may be misunderstood by the employee. If the employee says someone else was treated differently under similar circumstances, you will investigate it but make no concessions until doing so.
3. Always have a witness present. Individuals listen differently and individuals in the same meeting may interpret the same words or phrases differently. It is important to have a witness who will corroborate the substance and intent of the decision maker’s statements.
4. Compassion and Dignity must be the rule. The discharge will be difficult for the employee and the employer must anticipate reactions from quiet resignation to anger and outrage.
  - a. Except in exceptional circumstances, never force an employee to clean out his or her desk in front of other employees.
  - b. Except in exceptional circumstances, never force the employee to leave in the middle of the day.
  - c. Give the employee the option of removing personal effects after hours or having the employer package and ship the property.

5. Be prepared to discuss issues of likely importance to the employee:
  - a. Unemployment;
  - b. Health insurance;
  - c. Third party references;
  - d. The possibility of severance; and
  - e. Communications to co-employees.
6. Once the discharge decision is communicated, move the discussion to transition issues at the appropriate time. You want the employee to focus on moving on with his or her career instead of the propriety of the discharge decision. In this regard:
  - a. Consider a discussion outplacement options if that benefit is to be provided;
  - b. Discuss career options and what the employee should or should not consider with other career opportunities;
  - c. You will want to convey the thought that, just because this was not the right workplace, there is not another workplace or job where the employee can excel.
7. Ask the employee if there is anything the employer can do to make this obviously bad situation a little better.
8. Do not lose the opportunity to negotiate for and possibly secure a release of liability from the discharged employee.
9. If a release is to be signed, consider allowing the employee to resign or characterize the departure in a different way. As long as the reality of the situation is that an employee is separating on the employer's initiative, the characterization of the separation is not as important.